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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

TECHNICAL SERGEANT DUDLEY S. ANDERSON,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner's Sixth Amendment right to confront his accusers was violated when the military trial judge allowed the two alleged victims to testify behind a screen without following the minimum procedures mandated by this Honorable Court in *Maryland v. Craig*, 497 U.S. 836 (1990).

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The petitioner, Technical Sergeant Dudley S. Anderson, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on July 30, 1999.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Anderson*, 51 M.J. 145 (1999), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 31996, June 18, 1987) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on July 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1999) and 10 U.S.C. § 867(a)(3) (West Supp. 1999).

CONSTITUTIONAL PROVISION INVOLVED

The Confrontation Clause of the Sixth Amendment to the Constitution of the United States provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

Procedural History:

On June 7, August 8, August 11 and August 15-19, 1994, the petitioner was tried by a general court-martial consisting of officer and enlisted members convened at Bolling Air

Force Base, District of Columbia. Contrary to his pleas, the petitioner was found guilty of one specification each of carnal knowledge and communicating a threat, and two specifications each of indecent acts and assault in violation of Articles 120, 128 and 134, respectively, of the Uniform Code of Military Justice [hereinafter cited as U.C.M.J.] (10 U.S.C. §§ 920, 928, 934). All the offenses were alleged to have occurred within the two years preceding July 9, 1991. (TR. 9.1-9.3) He was sentenced to a dishonorable discharge, confinement for twelve (12) years and reduction to the pay grade of E-1 (airman basic).

The convening authority initially approved the sentence as adjudged on 9 November 1995, but this action was later withdrawn. Subsequently, on 6 December 1995, the convening authority took a second action to approve the sentence as adjudged. On 18 June 1997, the Air Force Court of Criminal Appeals affirmed both the findings and sentence and, thereby, denied the relief sought by the petitioner. (Appendix B).

On 9 July 1998, the United States Court of Appeals for the Armed Forces granted review on the following issues:

I. WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ALLOWING THE TWO ALLEGED VICTIMS TO TESTIFY BEHIND A SCREEN, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS, WHEN THERE WAS NO BASIS TO SUPPORT SUCH A RULING.

II. WHETHER APPELLANT WAS SUBSTANTIALLY PREJUDICED BY THE TESTIMONY OF THE GOVERNMENT EXPERT WITNESS, WHICH IMPERMISSIBLY BOLSTERED THE CREDIBILITY OF THE GOVERNMENT WITNESSES ACCUSING APPELLANT, BY

CONCLUDING THAT THEY WERE TRUTHFUL AND GAVE THEIR ALLEGATIONS A "STAMP OF SCIENTIFIC LEGITIMACY" AS WELL AS IMPERMISSIBLY "PROFILING" APPELLANT AS A CHILD SEXUAL ABUSER.

III. WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE MEMBERS THAT PRIOR STATEMENTS COULD BE CONSIDERED AS SUBSTANTIVE EVIDENCE WHEN THEY DID NOT MEET THE EXPRESS REQUIREMENTS OF MIL. R. EVID. 801(d)(1)(B) AND *UNITED STATES V. MCCASKEY*, 30 M.J. 188 (CMA 1990)

These issues were argued before the Court of Appeals for the Armed Forces on December 1, 1998. The court issued its decision on July 30, 1999, affirming the decision of the Air Force Court of Criminal Appeals and, again, denying relief to the petitioner. *United States v. Anderson*, 51 M.J. 145 (1999). The question presented in this petition is based on the first issue granted by the Court of Appeals for the Armed Forces.

Statement of Facts:

At the time of trial, the petitioner was a Technical Sergeant with over 19 years of exemplary service to the Air Force. When he was transferred to Iceland, his wife operated an in-home daycare business where she received numerous awards and commendations from the military base as well as the appreciation and trust of the parents and children she watched. On a few occasions in August and September 1990, Mrs. Anderson watched JW, the daughter of a family friend and neighbor, in her home when both JW's parents were working. (TR. 448, 457, 538, 542). There were

also a number of occasions when KR, the child of another neighbor and friend, came to the Anderson's home to play with their children. Mrs. Anderson, however, did not watch KR in her capacity as a home daycare provider. (TR. 545). JW and KR were the alleged victims of the offenses charged against the petitioner. At the time of trial, KR was eleven years old and JW was nine. (TR. 343, 377).

In February 1994, KR testified in person and under oath during the Article 32, U.C.M.J., 10 U.S.C. §832, pre-trial investigation hearing. During her pre-trial testimony, with petitioner present, she was able to recount in detail the events forming the basis of her allegations. (Article 32 Investigation Report, Ex. 24). Although JW was also invited to testify at the investigative hearing, her mother would not allow her to attend. (Article 32 Investigation Report, Ex. 9).

At trial, the prosecution's case would rely heavily on the testimony of the two alleged child victims. On 7 June 1994, the prosecution requested that both KR and JW be allowed to testify either by closed circuit television or out of the petitioner's sight. (TR. 60; Appellate Exhibit XVIII). The military judge deferred the issue until August after the defense objected, expressing doubt concerning the need for such an alternative form of testimony. The defense pointed out that KR had freely testified at the Article 32 investigation and that JW willingly discussed her claims in a videotaped interview with Child Protective Services (hereinafter "CPS"). (App. Exh. XIX). The defense also objected to an *ex parte* mental health evaluation of the girls as proposed by the prosecution and suggested that the court-martial appoint an independent expert. Finally, the defense requested that the military judge conduct an *in camera* interview of the girls to independently assess their emotional state. (TR. 83; Appellate Exhibit XIX). The military judge denied these requests. (TR. 83; Appellate Exhibit XXI).

In accordance with this ruling, Dr Bessett, a psychologist retained by the prosecution, interviewed the

girls. She testified that she talked to both girls during her evaluation for a total of only one-hour each. (TR. 194). Based on these sessions, she claimed that KR had a "very negative experience" at the Article 32, U.C.M.J., investigation and did not want to go through the court process again. (TR. 188). Although the Article 32 investigating officer stated on the record that the defense counsel's questions were both respectful and appropriate, KR apparently complained that she became tired and confused at the Article 32 investigation and that she felt harassed (Article 32 Report, Ex. 24, p. 93; TR. 188-89). Dr. Bessett admitted that much of KR's anxiety could be because she was afraid of being caught in other inconsistencies in her story. (TR. 198). Accordingly, Dr. Bessett concluded that KR could testify without any unusual procedures other than simply having her face the court-martial panel members, rather than the petitioner. (TR. 191, 200, 205).

Dr. Bessett also testified that JW's mother was very concerned about her daughter testifying and was very emotional. (TR. 189). She stated that at least part of JW's fears were due to her mother's emotional state. (TR. 194-195). Dr. Bessett advised the court that JW was afraid of the petitioner; however, in making this conclusion, Dr. Bessett apparently relied solely on JW's and her mother's representations. (TR. 189). She did not review any prior counseling records or do any in-depth psychological analysis. (TR. 196). Based on her one-hour interview, Dr. Bessett stated that JW was capable of explaining what happened in a clear manner, but that she was too young and vulnerable to be able to testify in open court with eight or nine strangers who would be seated as members. (TR. 190, 201, 206). Thus, Dr. Bessett recommended that closed circuit television be used to present JR's testimony (TR. 200). She also opined that a victim-witness assistant "might" be helpful (TR. 202).

After hearing this evidence, the prosecution requested that a screen be used for both witnesses to block their view

of appellant "if they were to turn around to try to look" in that direction. The prosecution also asked that appellant not be allowed in the courtroom until after each witness was seated behind the screen and be required to leave before each witness departed. (TR. 209-10) They further requested that each witness be allowed to have a victim-witness assistant next to them while testifying. *Id.* The defense objected to these procedures. The defense argued that KR testified freely at the Article 32 investigative hearing. (TR. 210-11). With regard to JR, the defense argued that her fears involved testifying in open court in front of a panel of court-martial members, spectators and all of the other court participants, rather than any direct fear of the petitioner. (TR. 210-11). The military judge ruled that KR could testify facing the members without a screen, but that JW could testify behind a screen. The military judge also ruled that a closed circuit television system would be set up so that the children's images would be projected to monitors positioned so that the military judge, defense counsel, petitioner, and court reporter could see the witness. Finally, the judge ruled that each witness could have a victim-witness assistant with them. (TR. 218, Appellate Exhibit XLV).

When it was time for her testimony, KR walked into the courtroom, which was filled with spectators, court-martial panel members and other court participants. She took her seat on the witness stand. The military judge then instructed the members about the television monitor and cameras that were set up in the courtroom. (TR. 338) The judge also ensured that the video equipment was properly set up to operate, granted permission for a prosecution expert to sit at counsel table and instructed the court-martial panel members as to the purpose of the victim-witness assistant who was seated beside KR. (TR. 338-39). After all these preliminary matters were attended to, KR whispered something to one of the prosecutors and the prosecution requested a recess. (TR. 339)

When the court reconvened, the prosecution requested that the petitioner be excluded from the courtroom while KR entered. (TR. 339). Without recalling the psychologist, or questioning the witness *in camera*, the military judge not only ordered that the petitioner be excluded from the courtroom when KR entered, but also ruled that KR could testify behind a screen. (TR. 340). The military judge stated:

> . . . the reason for psychologists and or others being allowed to testify before the witness even comes, is is [sic] that courts have said, you don't have to have the witness come in and try to testify before you go with some alternative way of testifying. The best guess of Doctor Bessett was that Krystal could testify under the way we currently have it set up. However, having observed her walk into the courtroom, face the members, the Accused and all of the spectators, I make a finding of fact that she was unable to even approach the witness stand and had to leave the courtroom saying, under her breath, "I can't do this," or words to that affect. With that finding of fact, I think there's an adequate basis for placing the screen here. . . .

(TR. 340). As a result, both key witnesses against the petitioner were allowed to testify behind a screen.

REASON FOR GRANTING THE PETITION

The Sixth Amendment of the Constitution expressly provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right is such a fundamental part of Anglo-American jurisprudence that it "comes to us on faded parchment" with a "lineage that traces back to the beginnings of western legal culture. " *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988); *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J. concurring). It is "a right long deemed so essential for the due protection of life and liberty that it is

guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." *Kirby v. United States*, 174 U.S. 47, 57 (1899). The Constitutional guarantee to confront witnesses is also so fundamental to the fair administration of military justice that it applies with full force and effect in trials by court-martial. *See, e.g., United States v. Daulton*, 45 M.J. 212 (1996); *United States v. Williams*, 37 M.J. 289 (CMA 1992); *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

The "Confrontation Clause provides two types of protections for the criminal defendant—the right to physically face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987); *Coy v. Iowa*, *supra*, at 1017. As to the right of physical confrontation, this Honorable Court has never doubted that the Sixth Amendment guarantees an accused a "face to face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, *supra*, at 1016-1019. Such face-to-face confrontation is "essential to a fair trial in a criminal prosecution." *Id.* at 1017, *quoting Pointer v. Texas*, 380 U.S. 400, 404 (1965). "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" *Coy*, *supra*, at 1019. While face-to-face confrontation may "upset the truthful rape victim or abused child," it may also "confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* at 1020. In essence, confrontation ferrets out the truth and "contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." *Lee v. Illinois*, 476 U.S. 530, 540 (1986); *Davis v. Alaska*, 415 U.S. 308, 316-17, n.4 (1974). Conversely, lack of proper confrontation, "calls into question the ultimate integrity of the fact-finding process." *Ohio v. Roberts*, 448 U.S. 56, 64 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Berger v. California*, 393 U.S. 314, 315 (1969); *United States v. Hines*, 23 M. J. 125, 128 (C.M.A. 1986).

In *Coy v. Iowa*, *supra*, this Honorable Court held that an Iowa procedure that allowed screens to be erected between the two complaining child witnesses and the defendant violated the defendant's Sixth Amendment right to confront witnesses. Like the case *sub judice*, the defendant was charged with committing sexual acts against two girls. 487 U.S. at 1014. Pursuant to Iowa law, the trial judge granted a prosecution motion allowing screens to be placed so that the complaining witnesses could avoid viewing the defendant as they gave their testimony. *Id.* at 1020. Writing for the majority, Justice Scalia said that it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face to face encounter." *Id.* In response to the State's suggestion that the confrontation interest was outweighed by the necessity to protect child victims, this Court acknowledged that Confrontation Clause rights are not absolute. *Id.* The Court, however, also pointed out that its prior precedent in this area did not address "the right narrowly and explicitly set forth in the Clause," but rather addressed reasonably implicit rights, such as the right of cross-examination. *Id.* The Court left open the question of whether there were any exceptions to the right to face-to-face confrontation, but said if there are exceptions, "they would surely be allowed only when necessary to further an important public policy." *Id.* at 1021.

Two years later in *Maryland v. Craig*, 497 U.S. 836 (1990), this Honorable Court was again confronted with the use of special procedures to elicit the testimony of a child witness in a child sexual abuse case. There, pursuant to Maryland law, the victim, a 6-year old girl, and several other child witnesses, were allowed to testify from a separate room in the presence of only the prosecutor and defense counsel. 497 U.S. at 840. The testimony was televised to the courtroom, where the defendant remained, by one-way closed circuit television; and the defendant maintained electronic communication with the defense counsel. *Id.* at 841-842.

In upholding the Maryland procedure, this Honorable Court held that, "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 855. This Court further explained that the showing of necessity must be case-specific. That is, the court "must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify." *Id.* Second, the court "must also find that the child witness would be traumatized, not by the courtroom generally, *but by the presence of the defendant.*" *Id.* at 856 (emphasis supplied). "Denial of face–to–face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma." *Id.* Finally, the trial court "must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimus*, i.e., more than "mere nervousness or excitement or some reluctance to testify." *Id., quoting Wildermuth v. State*, 310 Md. 496, 524, 530 A.2d 275, 289 (1987).

Over the last several years, both the state and federal courts have had numerous opportunities to apply the principles delineated in *Coy* and *Craig*. In many cases, these courts have had to determine the scope of the three case specific findings for necessity required by *Craig*. In *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998), for example, the Sixth Circuit Court of Appeals held that the trial court's findings were clearly erroneous under both *Craig* and 18 U.S.C. §3509. In allowing a child witness to testify via closed circuit television, the trial court found that the child witness was unable to testify due to fear of the defendant and that there was a substantial likelihood that the witness would

suffer emotional trauma from testifying. The appellate court, however, found that although the child stated that she did not want to see the defendant, she unequivocally stated that she was not afraid of the defendant. 137 F.3d at 899. Thus, an expression by the witness that she didn't want to see the defendant did not equate to fear of the defendant. Additionally, the appellate court held that the social worker used by the trial court as an expert was not sufficiently qualified because she did not have any special skill or knowledge relating to trauma.

In a prior decision by the Sixth Circuit, the court upheld a trial court's ruling to allow a child witness to testify via two-way closed circuit television. *United States v. Weekley*, 130 F.3d 747 (6th Cir. 1997). Unlike the situation in *Moses*, before the trial judge in *Weekley* allowed the procedure, he heard testimony from a Ph.D. with expertise in the area child sexual abuse and questioned the child witness in camera. *Id.* at 752. Other Federal circuit courts have similarly required specific findings of necessity based on actual evidence that the child witness feared the defendant and that the child would be traumatized by the presence of the defendant. *See, e.g., United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997)(Trial judge did not err by allowing three child victims to testify by closed circuit television where finding of fear of the defendant was based on pre-trial testimony of mental health therapist, apparent emotional inability of children to testify in open court, and questioning of the children in chambers in the presence of defense counsel, prosecutor, guardian ad litem, and court reporter.); *Hoversten v. Iowa*, 998 F.2d 614 (8th Cir. 1993)(District Court's granting of *habeas corpus* petition affirmed where state trial judge ordered use of one-way mirrors before he had seen the child and with no additional evidence on how face-to-face confrontation might effect the child.); *Cumbie v. Singletary*, 991 F.2d 715 (11th Cir. 1993)(Record failed to indicate that child witness feared the defendant or that testifying via closed circuit television would enhance the protection she needed.).

Like the federal courts, the state courts have also generally required that a court's necessity finding be predicated on actual evidence that the child witness feared the defendant and that the child would be traumatized by the presence of the defendant. *Ritchie v. State*, 720 So.2d 261 (Fla. Dist Ct. App. 1998)(holding that trial judge's findings, which failed to state the pertinent evidentiary facts upon which the court relied, were insufficient to sustain a finding of necessity.); *State v. Wright*, 690 So.2d 850 (La Ct. App. 1997)(trial court failed to make specific finding that child would suffer emotional distress due to defendant's presence, where ruling allowing video testimony was based on psychologists testimony that witness' distress would come only from "the courtroom setting" and the "sea of faces in the courtroom."); *State v. Lewis*, 478 S.E.2d 861 (S.C. Ct. App. 1996)(child's testimony alone is insufficient to support testimony via closed circuit television.); *State v. Peterson*, 530 N.W.2d 843 (Minn. Ct. App. 1995)(holding that it was error for trial court to allow 12 year old witness to testify on video tape where the judge based his decision almost exclusively on "expert" testimony, interviewing the child only after he decided to allow the witness to testify via videotape.); *Reuter v. State*, 886 P.2d 1298 (Alaska Ct. App. 1994)(holding that "the constitution forbids denying the accused face-to-face confrontation with an accuser in a criminal trial absent specific evidence and an express finding that the probable effect of the defendant's presence on the witness would significantly impair the witness's testimony."); Compare, *State v. Smith*, 730 A.2d 311 (NJ 1999)(holding that *Maryland v. Craig* does not require reversal where the cause of the child's incapacitating fear cannot be discerned.).

None of the cases cited above establish the minimum threshold of evidence, or the specific type of evidence, required for a case-specific finding of necessity under *Craig, supra*. Nevertheless, these cases do make clear that the trial court must support its findings with specific evidence. In this

regard, the case *sub judice* represents a significant departure from current Confrontation Clause jurisprudence.

The Court of Appeals for the Armed Forces held that the military trial judge's necessity determination was supported by the record. *United States v. Anderson*, 51 M.J. at 150. It found that Dr. Bessett's expert opinion provided a sound basis upon which the judge could determine whether and under what circumstances the children could testify. The court also held that KR's inability to take the witness stand provided a sound basis to permit KR to testify behind a screen. *Id.* The court stated "[t]he expert testimony and the military judge's own observation thus permitted the judge to determine that the impact on the girls was more than *de minimis*." *Id.*

In reaching its decision, the Court of Appeals, like the military trial judge, erroneously focused on the general impact that the testimony would have on the children. However, as the dissenting judge below aptly stated, the military trial judge's ruling and the Court of Appeals' decision did not reflect the teaching of this Honorable Court's prior rulings "that confrontation may not be denied absent a finding that the child witness would be traumatized, 'not by the courtroom generally, but by the presence of the defendant,' and that the distress suffered by the child is 'more than 'mere nervousness or excitement or some reluctance to testify.'" *Anderson*, 51 M.J. at 157 (Effron, J. dissenting), *citing Maryland v. Craig*, 497 U.S. at 855-56.

As indicated above, Dr. Bessett, the expert witness in this case, spent a total of one hour with each child before testifying concerning their ability to testify in open court. As to JW, Dr. Bessett stated that JW was afraid of the petitioner; however, she also stated that JW's mother was very upset and that JW's fears could, at least in part, be due to her mother's emotional state. In addition, Dr. Bessett said that JW's fears also centered on the entire court-martial proceeding itself. She stated specifically that JW would not

be able to testify in a courtroom full of people. These conclusions were based on a one hour interview in which no in-depth psychological analysis was undertaken to determine the potential impact testifying would have an JW. Yet, without even questioning JW *in camera*, the military judge concluded that her anxiety about testifying stemmed from the petitioner and that she would suffer more than *de minimus* emotional distress from testifying before him.

The military judge's findings with respect to JW failed to meet the exacting standards of *Maryland v. Craig, supra.* The evidence was, at best, unclear as to what caused JW's anxiety about testifying, and the military judge failed to attempt to clarify this point through *in camera* questioning. Additionally, there was virtually no evidence that JW would suffer any lasting emotional distress or trauma as a result of testifying in front of the petitioner. Under these circumstance, the military judge's ruling to allow JW to testify behind a screen cannot withstand Constitutional scrutiny.

Dr. Bessett further testified that KR felt the Article 32 hearing was a very negative experience and that she would not want to look at the petitioner for an extended period of time. (TR. 188-189) KR's fears, however, focused on the proceeding itself, rather than the petitioner. Thus, Dr. Bessett advised the court that KR should testify in open court provided she could face the court-martial panel members, rather than the petitioner. Nevertheless, the military judge allowed KR to testify behind a screen after she came into the court room and essentially refused to testify without one.

Contrary to the Court of Appeals' ruling, the military judge did not have an adequate basis to allow KR to testify in such a manner based merely on his observations. Dr. Bessett advised the court that KR's fears were focused on the procedure not the petitioner, even though she expressed a desire to not have to look at the petitioner. In order to find it necessary for KR to testify behind a screen, the military

judge would have had to find that KR would be traumatized by the presence of the petitioner and that the emotional distress caused by the petitioner's presence was more than *de minimis*. *Craig*, 497 U.S. at 856. No such finding, however, was made. Moreover, the record provides no evidence that would justify such a finding in KR's case.

The military judge had before him the testimony of a psychologist indicating that KR's fears were mainly focused on the procedure itself and his own observation that KR simply would not take the witness stand. He did not request any additional evidence from the expert, nor did he question KR *in camera* to determine the cause and extent of her anxiety. There was thus no evidence as to what caused KR's fears or whether there would be a significant and lasting impact on her psyche. Under these facts, the military judge simply did not have the evidence to make the findings required by this Honorable Court's decision in *Craig, supra.* As Judge Effron stated in his dissent:

> The end result was that K testified in a courtroom environment modified in a manner that identified appellant before the members of the court-martial as a person to be feared, a person whose impact on the witness was so traumatizing that extraordinary measures were warranted in the courtroom. When such measures are taken without an adequate showing of necessity, they are unconstitutional. *Craig, supra.*

Anderson, 51 M.J. at 157. (Effron, J dissenting).

In holding that the military judge had an adequate basis to determine necessity, the Court of Appeals for the Armed Forces significantly departed from the requirements outlined in *Craig*, as well as the Federal and state court cases that have had an opportunity to apply *Craig's* criteria. The Court of Appeals decision significantly lowers the evidentiary threshold required for a finding of necessity under *Craig* and permits military trial judges to allow specialized procedures

for children without making the requisite finding that the child would be traumatized by the defendant's presence and that such emotional distress would be more than *de minimis*.

CONCLUSION

The decision of the United States Court of Appeals for the Armed Forces represents a significant departure from this Honorable Court's Confrontation Clause jurisprudence. By sanctioning the military judge's ruling in this case, it has reduced the rigorous necessity standards established in *Maryland v. Craig*, 497 U.S. 836 (1990), to a requirement that there simply be evidence that the child witness will be distressed by the court-martial procedure itself. Such a rule not only contradicts *Craig*, but is also not in accord with the Federal and state courts that have applied the *Craig* standards. Therefore, the petitioner respectfully requests that this honorable court grant certiorari to the United States Court of Appeals for the Armed Forces.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1999

APPENDIX A

UNITED STATES, Appellee,

v.

Dudley S. ANDERSON, Technical Sergeant, U.S. Air Force, Appellant

No. 97-1137.

Crim.App. No. 31996.

U.S. Court of Appeals for the Armed Forces.

Argued Dec. 1, 1998.

Decided July 30, 1999.

Accused was convicted by general court-martial, Howard R. Altschwager, J., of carnal knowledge, indecent acts with two children, communicating a threat, assault, and assault and battery. The United States Air Force Court of Criminal Appeals affirmed the findings and sentence. Review was granted. The United States Court of Appeals for the Armed Forces, Crawford, J., held that: (1) military judge committed no error materially prejudicial to accused, or deny accused his right to face-to-face confrontation, when judge allowed child victims to testify behind a screen; (2) expert's testimony relating the elements of the child abuse accommodation syndrome and indicating which elements were present, given the facts of the case, adhered to the permissible limits of expert testimony; and (3) instruction on prior statements of child victims did not prejudice accused by highlighting the statements for the members just prior to deliberations.

Affirmed.

Sullivan, J., filed opinion concurring in part and in the result.

Effron, J., filed dissenting opinion.

1. Military Justice ⚷ 1248

Normally, the Confrontation Clause requires the presence of the accused and ability to see the accusatory witnesses. U.S.C.A. Const.Amend. 6.

2. Military Justice ⚷ 1248

Confrontation Clause requires that the accusatory witnesses be under oath. U.S.C.A. Const.Amend. 6.

3. Military Justice ⚷ 1248

Under the Confrontation Clause, accused has the right to have the finders of fact evaluate the demeanor of the witnesses. U.S.C.A. Const.Amend. 6.

4. Military Justice ⚷ 1248

The Confrontation Clause includes the right to cross-examine witnesses, although the right, while fundamental, is not absolute. U.S.C.A. Const.Amend. 6.

5. Military Justice ⚷ 1248

Right of confrontation may yield to an important public policy when the reliability of the testimony at issue is otherwise assured. U.S.C.A. Const.Amend. 6.

6. Military Justice ⚷ 1248

Any deviations from the common form of confrontation must ensure the reliability of the evidence.

7. Military Justice ⚷ 1248

To support a determination to limit the right to face-to-face confrontation in case of a child witness, the military judge must make a finding of necessity, i.e., that there is a likelihood that the child will suffer at least moderate

emotional and mental harm if required to testify in the accused's presence. U.S.C.A. Const.Amend. 6.

8. Military Justice ⚷ 1422

Military judge's finding of necessity to limit the right to face-to-face confrontation is a question of fact which will not be reversed unless it is clearly erroneous or unsupported by the record. U.S.C.A. Const.Amend. 6.

9. Military Justice ⚷ 1248

Military judge committed no error materially prejudicial to accused, and did not deny accused his right to face-to-face confrontation, when judge allowed child victims to testify behind a screen; judge's determination of necessity was supported by expert opinion, and the arrangement of closed circuit televisions and screens was such that all parties could see each child testify, and the defense was able to conduct full cross-examination. U.S.C.A. Const.Amend. 6.

10. Military Justice ⚷ 1120

An expert can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits.

11. Military Justice ⚷ 1120

Qualified expert can summarize the medical evidence in a child sexual abuse case and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse, but the expert may not express an opinion on the ultimate issue of sexual abuse.

12. Military Justice ⚷ 1120

An expert cannot serve as a human lie detector for a court-martial.

13. Military Justice ⚷ 1120

Testimony which is the functional equivalent of an expert's opinion that the victim should be believed is inadmissible.

14. Military Justice ⚷ 1120

Expert's testimony relating the elements of the child abuse accommodation syndrome and indicating which elements were present, given the facts of the case, adhered to the permissible limits of expert testimony.

15. Military Justice ⚷ 1414.1

Plain error is a doctrine that is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.

16. Military Justice ⚷ 1414.1

To establish plain error, accused must demonstrate: that there was error; that such error was plain, clear, or obvious; and that the error affected accused's substantial rights.

17. Military Justice ⚷ 1415

Expert testimony which categorized accused, a baby-sitter and adult, as an authority figure was not plain error; accused was not called a child molester, and expert's obvious conclusion was harmless.

18. Military Justice ⚷ 1415

No plain error occurred in child sexual abuse case when expert witness ventured into area of credibility of victims, where defense counsel's objection was sustained and an instruction was given.

19. Military Justice ⚷ 1415

Where, during voir dire, defense counsel inquired into expert's qualifications and affirmatively stated that he had "no objections" to trial counsel's offer of witness as an expert in child sexual abuse, any claim that witness was not qualified was waived.

20. Military Justice ⚷ 1120

Expert testimony concerning child abuse accommodation syndrome met the foundational requirements for the admissibility of scientific evidence.

21. Military Justice ⚷ 1420

Court of Appeals for the Armed Forces reviews a challenge of instructional error using an abuse of discretion standard.

22. Military Justice ⚷ 1268

Instruction on prior statements of child victims did not prejudice accused by high-lighting the statements for the members just prior to deliberations, as testimony of the victim was a substantial part of the evidence presented in a strong case, and their statements were likely to stand out in the members' minds as they deliberated; moreover, the defense itself highlighted the testimony of the victims by attempting to impeach them with their own prior statements.

CRAWFORD, J., delivered the opinion of the Court, in which COX, CJ., and GIERKE, J., joined. SULLIVAN, J., filed an opinion concurring in part and in the result. EFFRON, J., filed a dissenting opinion.

For Appellant: *Lieutenant Colonel Ray T. Blank, Jr.* (argued); *Colonel Douglas H. Kohrt* (on brief).

For Appellee: *Major Karen L. Manos*, USAFR (argued); *Lieutenant Colonel Anthony P. Dattillo* and *Major Ronald A Rodgers* (on brief); *Colonel Brenda J. Hollis.*

Judge CRAWFORD delivered the opinion of the Court.

Contrary to his pleas, appellant was convicted by a panel of officer and enlisted members of carnal knowledge; indecent acts with two children, K and J; communicating a threat; assault; and assault and battery, in violation of Articles 120, 134, and 128, Uniform Code of Military Justice, 10 USC §§ 920, 934, and 928, respectively. Appellant was sentenced to a dishonorable discharge, 12 years' confinement, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion. We granted review of the following issues:

I. WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ALLOWING THE TWO ALLEGED VICTIMS TO TESTIFY BEHIND A SCREEN, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS, WHEN THERE WAS NO BASIS TO SUPPORT SUCH A RULING.

II. WHETHER APPELLANT WAS SUBSTANTIALLY PREJUDICED BY THE TESTIMONY OF THE GOVERNMENT EXPERT WITNESS, WHICH IMPERMISSIBLY BOLSTERED THE CREDIBILITY OF THE GOVERNMENT WITNESSES ACCUSING APPELLANT, BY CONCLUDING THAT THEY WERE TRUTHFUL AND GAVE THEIR ALLEGATIONS A "STAMP OF SCIENTIFIC LEGITIMACY" AS WELL AS

IMPERMISSIBLY "PROFILING" APPELLANT AS A CHILD SEXUAL ABUSER.

III. WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE MEMBERS THAT PRIOR STATEMENTS COULD BE CONSIDERED AS SUBSTANTIVE EVIDENCE WHEN THEY DID NOT MEET THE EXPRESS REQUIREMENTS OF MIL.R.EVID. 801(d)(1)(B) and *UNITED STATES V. MCCASKEY*, 30 MJ 188 (CMA 1990).

We resolve these issues against appellant for the reasons set forth below.

FACTS—ISSUE I

In February 1994, K testified in person during the Article 32[1] investigation. However, on June 7, 1994, the prosecutor requested to have both K and J testify either by closed-circuit television or out of appellant's sight.

The defense objected to an *ex parte* evaluation by Dr. Linda Bessett, a licensed psychologist, of the girls' ability to testify. The defense suggested an independent, court-appointed expert conduct this evaluation with defense presence at the interview or, in the alternative, that the interview be taped. The defense also requested that the military judge conduct an *in camera* interview of the girls to assess independently each girl's emotional state. The military judge refused to Prevent Dr. Bessett from conducting this interview, to permit the defense expert to be present, or to have the interview videotaped.

After the judge's ruling, Dr. Bessett interviewed the girls with Ms. Diana Schofield, a government expert in child

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[1] Uniform Code of Military Justice, 10 SCU § 832.

sexual abuse, as an observer. Dr. Bessett testified concerning the effect that testifying in the presence of appellant would have upon the victim. Dr. Bessett made specific recommendations concerning the parameters of that testimony. In ruling on the government request, the military judge made the following findings of fact:

> [K] testified at the Article 32 investigation and viewed it as a very negative experience. The questions were confusing and it was a very long proceeding. [K] told Dr. Bessett that she was scared about the trial process and about being in the same room as the accused. Dr. Bessett believes it would be psychologically difficult for her to testify in court and face the accused, but believes the accused [sic] could identify the accused in court and testify in his presence, as long as she did not have to look at him for a long period of time. Her anxiety level will be very high. Dr. Bessett's professional opinion- is that [K] could testify either behind a screen, or in a position where the accused was not in direct line of sight with her.
>
> On 12 August 1994, Dr. Bessett separately interviewed [J] and her mother . . . [who] reported her daughter was having nightmares again. [J] stated she was afraid the accused would kill her, having allegedly threatened to do so while the alleged abuse was occurring. In Dr. Bessett's opinion, [J] is very scared of the accused, and would not be able to testify if she could see the accused. A tour of the court room did not help her, and her fear is overwhelming. She believes [J] could psychologically cope with identifying the accused from a picture, but she could not cope with identifying the accused in person. Dr. Bessett's professional opinion is that [J] can testify under limited conditions because of her fear of the accused. Specifically, the preference would be for

> her to testify in a separate room with only a trial and defense counsel present and she could not see the accused or court members. Alternatively, she believes she may be able to testify behind a screen.

The military judge announced the procedure that would be used in light of his findings:

> [K] will be allowed to testify facing away from the Accused, directly facing the court members. [J] will be allowed to testify facing the Trial Counsel. The closed circuit television camera will project their images to a television which will be positioned for the military judge, Defense Counsel, the Accused and Court Reporter to see. And, I note the way the t.v. is setup right now, I can't see, but it appears I should be able to see the faces of the witnesses from where I'm sitting. A screen will not be set up for [K] unless it's [sic] presence appears to become necessary. A screen will be positioned along the side of the witness box for [J]. The witnesses may already be on the stand before the military judge and members come into the room. The Accused will be seated at the seat at the Defense Counsel table which is farthest away from the witnesses. Cross-examination of the witnesses will be done in such a position of the courtroom that the vision of the witnesses conforms with the spirit of this ruling. The witnesses will be instructed to speak up and to let the Court know when they need a break. Additionally, the witnesses will be allowed to have a victim witness representative sit next to them, but that person will be instructed beforehand not to give any cues or anything to the witnesses.

Further accommodation was directed so that the two defense counsel would have eye contact with each other to facilitate communication, and the military judge indicated that there would be latitude to permit counsel to communicate as

needed. Defense counsel renewed his objection to the procedures as a denial of due process.

Prior to K taking the stand, the military judge gave the following instruction concerning the special measures taken to facilitate her testimony:

> Members of the court, . . . as you can see, a television monitor is being set up and there are video cameras in the courtroom. I have determined that the courtroom will be arranged in the manner that you see it. The witness will be seated in front of me here, facing you the court members with a closed-circuit video camera transmitting the picture of the child testifying on a television monitor so the defense and the Accused can see her face, because she will be facing away from them towards you. You are instructed that you may not draw any inference against or for either side based upon the way the courtroom is arranged during the testimony of [K]. The decision to arrange the courtroom in this manner is one that I made. You should evaluate the testimony of [K] the same as all of the other witnesses, and not take into account the arrangement of the courtroom in evaluating any witnesses [sic] testimony.
>
> I will later give you a more detailed instruction on the credibility of a witness. I again, specifically instruct you that you cannot and must not infer anything for or against either party based upon my decision to arrange the courtroom in this manner. Additionally, I would instruct everyone in the courtroom to not indicate in any way that anyone is behind the television screen that we have here. This applies to the spectators as well as the parties.

One additional accommodation was made after K was initially unable even to approach the witness stand:

> However, having observed her walk into the courtroom, face the members, the Accused and all of the spectators, I make a finding of fact that she was unable to even approach the witness stand and had to leave the courtroom saying, under her breath, "I can't do this," or words to that affect.

The screen and television equipment were repositioned and appellant was asked to leave the room until K was seated. The defense concedes that the judge gave an instruction not to draw any inferences from the procedures being used.

DISCUSSION—ISSUE I

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This is a fundamental right. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross tion is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* at 405, 85 S.Ct. 1065.

[1-4] The Confrontation Clause "reflects a preference for face-to-face confrontation at trial." *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *see also Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)("a preference that 'must occasionally give way to considerations of public policy and the necessities of the case'")(quoting *Mattox v. United States*, L56 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895)). Normally, the Confrontation Clause requires the defendant's presence and ability to see the accusatory witnesses. Exceptions may be made. A second aspect of the Confrontation Clause is that the witnesses are under oath. A third is that the defendant has the right to have the finders of fact evaluate the

demeanor of the witnesses. Fourth, the Confrontation Clause includes the right to cross-examine these witnesses. *See California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). While this right is fundamental, it is not absolute. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."). There are various interests- that must be balanced against the defendant's right of confrontation, including the Government's "strong interest in effective law enforcement," *Roberts, supra* at 64, 100 S.Ct. 2531, the state's compelling "interest in the physical and psychological well-being of a minor victim," *Craig, supra* at 852, 110 S.Ct. 3157, and the "societal interest in accurate factfinding." *Bourjaily v. United States*, 483 U.S. 171, 182, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

[5,6] The right of confrontation may yield to an important public policy when the reliability of the testimony at issue is otherwise assured. *Maryland v Craig, supra,* In *Craig,* closed-circuit television was approved in a case involving a child victim where: "(1) there was a case-specific finding that testimony by the child in the presence of the defendant would cause the child to suffer serious emotional distress such that the child could not reasonably communicate; (2) the impact on the child would be 'more than *de minimis*'; (3) the child testified via one-way closed-circuit television, enabling the judge, jury, and defendant to observe the child's demeanor during testimony; and (4) the child was subject to full cross-examination." *United States v. Longstreath*, 45 MJ 366, 372 (1996), citing *Craig, supra* at 856-57, 110 S.Ct. 3157. As illustrated in *Longstreath*, any deviations from the common form of confrontation must ensure the reliability of the evidence.

[7,8] This Court has upheld various methods of obtaining testimony without face-to-face confrontation

between an accused and a child victim. *See United States v. Williams*, 37 MJ 289 (CMA 1993)(child testified from a chair in the center of the courtroom); *United States v. Thompson*, 31 MJ 168 (CMA 1990)(children testified with their backs to the accused, but facing the judge and counsel); but *see United States v. Daulton*, 45 MJ 212 (1996)(accused excluded but permitted to observe the child through closed-circuit television). To support a determination to limit the right to face-to-face confrontation, the military judge must make a finding of necessity, *i.e.*, that there is a likelihood that the child will suffer at least moderate emotional and mental harm if required to testify in the accused's presence. *See D.A.D. v. State*, 566 So.2d 257 (Fla.App. 1990). This finding is a question of fact which "will not be reversed unless it is clearly erroneous or unsupported by the record." *Longstreath, supra* at 373, citing *United States v. Carrier*, 9 F.3d 867, 870-71 (10th Cir.1993).

[9] The military judge's determination of necessity in the instant case is supported by the record. Dr. Bessett's expert opinion provided a sound, adequate basis upon which the military judge considered whether each of the child victims could testify and under what circumstances each could communicate. When it became obvious that K could not even take the witness stand, the military judge had a clear basis upon which to modify his initial ruling and permit K to testify behind the screen. *See Longstreath, supra* at 373. The expert testimony and the military judge's own observation thus permitted the judge to determine that the impact on the two girls was more than *de minimis*. The arrangement of televisions and screens was such that all parties could see each child testify, and the defense was able to conduct full cross-examination while maintaining communications amongst themselves and with appellant.

Under these circumstances, we hold that the military judge committed no error materially prejudicial to appellant's substantial rights; nor was appellant improperly denied his right to face-to-face confrontation.

FACTS—ISSUE II

Appellant characterizes the testimony of the government expert on child sexual abuse, Ms. Schofield, as profile evidence which impermissibly labeled him as a child sexual abuser. He complains that the expert also impermissibly vouched for the truthfulness and credibility of the two child victims. Appellant acknowledges that he did not object to testimony which allegedly implied the girls were telling the truth or that sexual abuse had occurred. Nor, we note, did appellant object to the qualifications of Ms. Schofield or to any evidence from her which allegedly labeled him as a child sexual abuser.

Ms. Schofield described the elements of Child Abuse Accommodation Syndrome and explained that it was a pattern of behavior used to explain misleading and contradictory actions by child victims of abuse. Trial counsel then asked her to relate the facts of the case to the various elements of the syndrome. Ms. Schofield noted that appellant, as an adult and baby-sitter, "did have the power and he did have the access and did threaten, or allegedly threatened the children." In discussing the element of delayed disclosure, Ms. Schofield noted that, when K, saw a car that resembled [appellant's] in the housing area," it was "very significant' and "scared her." It is this testimony which appellant claims labeled him as a child abuser and attempted to vouch for the credibility of the child victims.

Appellant further attacks this line of questioning because, by relating facts of this case as made known to her, Ms. Schofield was allegedly telling the members that the children were victims and they should be believed. Appellant asserts that, because Ms. Schofield vouched for the credibility of the children and labeled appellant as a child abuser, this error was obvious and substantial. Further, because the primary issue was credibility, appellant urges that this was prejudicial error requiring corrective action.

DISCUSSION-ISSUE II

[10-13] It is clear from the cases of this Court that an expert "can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits." *United States v. Birdsall*, 47 MJ 404, 409 (1998), quoting *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir.1993). A qualified expert can also "summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse." *Id.* But the expert may not express an opinion on the "ultimate issue of sexual abuse." *Id.* Nor can an expert serve as a human lie detector for the court-martial. As we stated in *Birdsall supra* at 410, "testimony which is the 'functional equivalent' of an expert's opinion that the victim should be believed is inadmissible."

[14] Ms. Schofield did not opine that the children were, in fact, abused or that appellant did, in fact, commit the abuse. *See United States v. Birdsall supra; United States v. Harrison*, 31 MJ 330 (CMA 1990). Ms. Schofield related the elements of the syndrome and indicated which elements were present, given the facts of this case. She explained why certain facts she had been provided were significant in the context of the syndrome.

Additionally, Ms. Schofield was not permitted to assert that the children were credible. *See United States v. Birdsall, supra* Mil.R.Evid. 608(a), Manual for Courts-Martial, United States (1994 ed.)[2] When Ms. Schofield ventured into the area of credibility, the military judge sustained defense counsel's objection. Upon further objection, the military judge immediately instructed the members as follows:

> Members of the Court, you're advised that only you the members of the Court determine the credibility of witnesses in what the facts of this case are. No

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[2] All Manual provisions are cited to the version applicable at the time of trial. The 1998 version is unchanged, unless otherwise indicated.

> expert, witness or other witness can testify that the alleged victim's account of what occurred is true or credible, or that the expert believes that the alleged victims, or that the expert believes the alleged victims, [sic] or that a sexual encounter occurred. To the extent that you believed that Miss Schofield has testified or implied that she believes the alleged victims or that a crime occurred or that the alleged victims are credible, you may not consider this as evidence that a crime occurred or that the alleged victims are credible.

These actions by the military judge assured that impermissible evidence did not get to the members and that any perception that the expert was testifying about credibility or the actual commission of an offense was erased. Ms. Schofield's testimony adhered to the permissible limits of expert testimony. *See United States v. Suarez*, 35 MJ 374 (CMA 1992).

We hold that the proffered testimony was permissible. Regardless, we hold that there was no plain error.

[15,16] Because there was no objection to Ms. Schofield's testimony, appellant may only prevail if there was plain error.

> Plain error is a doctrine that "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Strachan*, 35 MJ 362, 364 (CMA 1992), quoting *United States v. Fisher*, 21 MJ 327, 328-29 (CMA 1986), quoting *United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 1592 n. 14, 71 L.Ed.2d 816 (1982). "To establish plain error, appellant must demonstrate: that there was 'error'; that such error was 'plain, clear, or obvious'; and that the error 'affect[ed]' appellant's 'substantial rights.'" *United States v. Czekala*, 42 MJ 168, 170 (1995), quoting *United States,v. Olano*,

507 U.S. 725, 732, 734, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993).

United States v. Hall, 46 MJ 145, 146-47 (1997).

[17] Any error herein was not plain and substantial. *United States v. Powell*, 49 MJ 460 (1998). Appellant was categorized as an authority figure (baby-sitter and adult), not as a child molester. Such an obvious conclusion is harmless and does not distort the fairness of this trial to such an extent that application of plain error is warranted.

[18] Similarly, with respect to any contention that Ms. Schofield vouched for the credibility of the children, there is no plain error. Defense counsel's objection was sustained and an instruction was given. Full relief was afforded to appellant in a timely manner. Thus, not only was any perceived error corrected on the spot, but any potential prejudice was eradicated.

[19] Within this issue, appellant makes two other related assertions. First, he implies that Ms. Schofield was not qualified as an expert. This claim is easily disposed of. Ms. Schofield had specialized training and experience which would assist the trier of fact and clearly qualified her as an expert. Mil.R.Evid. 702. During *voir dire*, defense counsel inquired into Ms. Schofield's qualifications and affirmatively stated that he had "no objections" to trial counsel's offer of Ms. Schofield as an expert in child sexual abuse. Any claim that Ms. Schofield was not qualified was waived. Under the circumstances, there is obviously no plain error.

[20] Next, appellant claims that Child Abuse Accommodation Syndrome did not meet the foundational requirements for the admissibility of scientific evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Clearly, the military judge did not abuse his discretion in admitting this testimony. First, such evidence is admissible. *See United States v. Birdsall supra; United States v. Suarez, supra*, Second, failure to object waives this alleged defect. *United States v.*

Johnson, 35 MJ 17, 22 (CMA 1992). Finally, under the circumstances, as noted above, there is no basis to invoke the plain error doctrine. We hold that there was no error that "materially prejudiced the substantial rights of [appellant]." Art. 59(a), UCMJ, 10 USC § 859(a).

FACTS-ISSUE III

Appellant contends that the military judge erred when he instructed the members that they could consider several statements by K and J as prior consistent statements. The military judge's instructions, in relevant part, were as follows:

> You have heard evidence that the witness [K] made statements prior to trial that may be consistent with her testimony at trial, specifically, that the abuse began in the Summer of 1990; the bleeding happened in the living room; he put his private part in her private part; his threat that he would not allow her to play with [his daughter]; and she told [her friend] that he was doing stuff to her too. You have heard evidence that the witness [J] made statements prior to trial that may be consistent with her testimony at trial, specifically, that he put a knife to her neck; he threatened her with a gun; he threatened to kill her; he put a pillow over her face; and he touched her "boob" with his fingernail. If you believe that such a consistent statement was made, you may consider it for its tendency to refute the charge of improper influence or improper motives. You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein.

When trial counsel requested this instruction and produced a list of statements which she wished to be included in the instruction, defense counsel objected primarily on the basis that Mil.R.Evid. 801(d)(1)(B) required that the

statement "be offered at trial in rebuttal to a rebutted [sic] claim of recent fabrication, improper influence or motive." Defense counsel noted that certain of these statements were "not offered in rebuttal to anything," and that it was the defense, not the Government, which brought the statements out for the record.

Appellant's argument here is that these statements were not admitted as prior consistent statements and that, by instructing on them as such, the military judge erred to appellant's prejudice by allowing the members to consider the statements as substantive evidence. The Government concedes that the military judge's characterization of the statements as prior consistent statements was incorrect but asserts that the instruction that the members could consider the statements as substantive evidence was nonetheless correct. The Court of Criminal Appeals reached a similar conclusion, unpub. op. at 8, and we agree.

DISCUSSION-ISSUE III

None of the statements here were specifically admitted as prior consistent statements pursuant to Mil.R.Evid. 801(d)(1)(B). That rule applies to statements made prior to trial which are consistent with the witness's testimony and which are "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." In a typical scenario, the defense counsel would try to impeach a witness's credibility, and the trial counsel would try to rehabilitate the witness's credibility by introducing a prior consistent statement. *See United States v. McCaskey*, 30 MJ 188 (CMA 1990). The issue there would be whether the out-of-court statement was properly admitted.

That is not the scenario presented by this case, however. Here, the defense strategy, in part, was to show that K's and J's testimony was not credible and was the result of coaching by adults. As part of that strategy, defense counsel

questioned the girls about statements they had made prior to trial and attempted to point out inconsistencies. In actuality, the defense ended up soliciting affirmations of their testimony. Thus, the statements in issue were, in large part, presented to the members by defense counsel. Having been presented as such, the statements were already substantive evidence which the members could consider for their truth if they chose to believe them.

The question before us, then, is whether or not the instruction otherwise prejudiced appellant by highlighting the statements for the members just prior to deliberations.

[21,22] We review a challenge of instructional error using an abuse of discretion standard. *United States v. Damatta-Olivera*, 37 MJ 474, 478 (CMA 1993), *cert. denied*, 512 U.S. 1244, 114 S.Ct. 2760, 129 L.Ed.2d 875, (1994). A military judge "has substantial discretionary power in deciding on the instructions to give." *Id.* at 478. Based on the evidence presented in this case, we cannot say that the military judge abused his discretion by instructing the members on these statements.

The testimony of these young victims was a substantial part of the evidence presented in a strong case. Statements such as, "He put his private part in my private part," and, "He threatened me with a gun," were likely to stand out in the members' minds as they deliberated. The defense itself highlighted the testimony of these girls by attempting to impeach them with their own prior statements. Appellant should not now be allowed to retreat from that strategy because it was unsuccessful. Nor should appellant now be allowed to fault the military judge for that lack of success. *Cf United States v. Raya*, 45 MJ 251, 254 (1996)("Invited error does not provide a basis for relief."); *United States v. Schnitzer*, 44 MJ 380, 384 (1996)(Everett, S.J. and Gierke, J., concurring in the result)("[S]ince to a considerable extent the error was invited by the defense, I conclude that this accused is not entitled to relief."); *United States v. Johnson*, 26 F.3d

669, 677 (7th Cir.1994); *A.E. v. Independent School District No. 25*, 936 F.2d 472, 476 (10th Cir.1991).

In addition, there were at least two statements to which defense counsel failed to object but which were ultimately included in the instruction: 1) "that the abuse began in the Summer of 1990," and 2) "[K] told [her friend] that he was doing stuff to her too." [3] Regardless of our analysis above, with regard to these statements, appellant has waived his challenge, Mil.R.Evid. 103, and we find no plain error. *See Powell*, 49 MJ 460.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

SULLIVAN, Judge (concurring in part and in the result):

I disagree with the majority's reasoning in deciding the third issue. The third granted issue asks:

III

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE MEMBERS THAT PRIOR

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[3] Defense counsel's objection to a third statement proposed by the Goverrunent is somewhat unclear on the record. Trial counsel proposed including the statement, "The bleeding happened in the living room, and resulted in blood in my undenvear." Defense counsel's objection appears to be only to the second part of the sentence: "In regards to C, the bleeding happened in the living room, and resulted in blood in my underwear. Regarding the blood in the underwear, we would ask that you add to the inconsistent list that she told Lieutenant Crescenzi that no blood was in the underwear. . . . And we would object to that being consistent because it was not offered in rebuttal to anything." The military judge, in fact, only used the first part of the sentence in his instruction. The Court of Criminal Appeals appears to have considered defense counsel to have not objected to that part of the statement actually used in the instruction. We will also consider defense counsel to have failed to object to that statement.

STATEMENTS COULD BE CONSIDERED AS SUBSTANTIVE EVIDENCE WHEN THEY DID NOT MEET THE EXPRESS REQUIREMENTS OF MIL.R.EVID. 801(d)(1)(B) AND *UNITED STATES V. MCCASKEY*, 30 MJ 188 (CMA 1990).

In my view, any error, in instructing the members that the alleged victims' pretrial statements could be considered as substantive evidence in this case was harmless beyond any doubt.

The trial judge gave the following instructions with respect to evidence of pretrial statements by the alleged victims in this case:

> Now, you have heard evidence that the witness [K] made a statement prior to trial that may be inconsistent with her testimony at this trial, specifically, her statement that [B] told her the Accused was doing stuff to her also, and she did not see a scar on the Accused. You have heard evidence that the witness Petty Officer [R] made statements prior to trial to Petty Officer [D] that may be inconsistent with his testimony at trial, specifically, that he possessed and watched pornographic videos, [K] saw he and his wife having sexual intercourse, and she was on his back on one occasion when they were having sexual intercourse. You have heard evidence that the witness [L] made statements to [B] that they possessed pornographic videos and that [K] had seen her and Petty Officer [R] engaged in sexual intercourse. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the believability of the testimony of [K] and Petty Officer [R] and L. You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement.

> *You have heard evidence that the witness [K] made statements prior to trial that may be consistent with her testimony at trial,* specifically, that the abuse began in the Summer of 1990; the bleeding happened in the living room; he put his private part in her private part; his threat that he would not allow her to play with [T]; and she told [B] that he was doing stuff to her too. *You have heard evidence that the witness [J] made statements prior to trial that may be consistent with her testimony at trial,* specifically, that he put a knife to her neck; he threatened her with a gun; he threatened to kill her; he put a pillow over her face; and he touched her "boob" with his fingernail. If you believe that such a consistent statement was made, you may consider it for its tendency to refute the charge of improper influence or improper motives. *You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein.*

(Emphasis added.)

Prejudice, however, from such *substantive use* instructions, even if erroneous, is hard to imagine for several reasons. First of all, the two alleged victims testified that appellant committed the charged offenses. Second, the pretrial statements were never admitted in this case. Third, the defense first cross-examined the alleged victims about various details in these statements, and when acknowledged by the witnesses, it also had them confirm the previously asserted facts as true. Finally, the victims' testimony on the prior statements added no material fact not covered in their in-courtroom testimony.

In addition, the defense cross-examined the alleged victims about prior statements they had made concerning the charged incidents, in hopes of contradicting their trial testimony with their pretrial statements. This was

permissible, although ultimately unsuccessful, impeachment under Mil.R.Evid. 609 and 613, Manual for Court–Martial, United States (1994 ed.). *See United States v. Banker*, 15 MJ 207, 210 (CMA 1983). The defense did not attempt to limit the use of the witnesses' answers to the issue of their credibility. *See* Mil.R.Evid. 105. It waited until after the witnesses testified and after the Government requested during the closing instructions that the evidence be considered substantively. In my view, their belated concern under the circumstances of this case was too late. *See generally United States v. Taylor*, 44 MJ 475, 480-81 (1996).

EFFRON, Judge (dissenting):

At the time of his trial, appellant was a Technical Sergeant in the Air Force with over 19 years of service. The offenses of which appellant was convicted alleged various forms of child abuse involving K, who was 11 years old at the time of trial, and J, who was 9 years old at the time of trial. K who first made the allegations of the abuse, did not do so until nearly 2 years after she had last seen appellant. Appellant testified on his own behalf and denied the allegations. The heart of the defense case pitted appellant's credibility against the testimony of K and J.

As noted in the majority opinion, the first granted issue involves the Confrontation Clause of the Sixth Amendment, which provides that an accused "shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court, as noted by the majority, has described this as a "fundamental requirement for the kind of fair trial which is this country's constitutional goal," *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), providing "a preference for face-to-face confrontation at trial." *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the primary case relied upon by the majority, the Supreme Court recognized a very limited exception:

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. at 855, 110 S.Ct. 3157.

Craig provided that "[t]he requisite finding of necessity must of course be a case-specific one." According to the Supreme Court, an alternative procedure must be the product of evidence that supports a finding: (1) that the alternative procedure "is necessary to protect the welfare of the particular child witness who seeks to testify'; (2) that the child witness would be traumatized, "not by the courtroom generally, but by the presence of the defendant"; and (3) that "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" *Id.* at 110 S.Ct. 3157.

The Court emphasized that "courtroom trauma," by itself, does not provide a sufficient basis to justify denial of face-to-face confrontation. There must be a showing that "it is the presence of the defendant that causes the trauma." *Id.* at 856, 110 S.Ct. 3157.

Craig sets a rigorous standard, which requires rigorously fair procedures. In the present case, the military judge failed to apply the procedural safeguards necessary to ensure fair consideration of appellant's constitutional rights.

This is not a case in which the victim was so traumatized by the events that she could not communicate in an adversarial proceeding. Prior to trial, K testified at the Article 32[1] hearing in the presence of appellant. There is no

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[1] Uniform Code of Military Justice, 10 USC § 832.

indication in the record of the Article 32 proceeding that the presence of appellant produced the type of trauma discussed in *Craig*. On the contrary, K testified at length and provided detailed testimony about the alleged offenses.

Prior to trial, the prosecution filed a written "Motion for Alternative Forms of Child Testimony," in which it asked for an Article 39(a)[2] hearing "to determine whether [J] and [K] are able to testify in front of the accused at trial." The Government indicated that it would offer expert testimony at the hearing that would be based on psychological interviews of the children that had been scheduled but not yet conducted.

The Government represented that it expected the expert to state that if the children were required to testify in the physical presence of appellant, each "would undergo serious emotional distress, such that the child would be unable to communicate;" and that such stress "would be more than *de minimus*, and would result, primarily, from the physical presence of the accused in the courtroom." The prosecution moved that, if such conclusions were reached by the expert, both J and K be permitted to testify by closed-circuit television or "in such a manner as to avoid eye contact with the accused."

Defense-counsel filed a written response to this motion. The defense objected to an *ex parte* examination by an expert of the prosecution's selection and argued that the better approach was to have the examination done by a court-appointed military child psychologist. As an alternative, the defense asked that its own expert be permitted to attend any examinations done by the Government's expert. The defense also requested that any such interviews be videotaped. Finally, counsel asked that the military judge, after hearing the expert testimony, undertake an in camera interview of the girls to assess their emotional state and to ascertain the

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[2] UCMJ, 10 USC § 839(a).

understanding of the girls as to the purpose of the examinations.

The military judge denied the defense motions. Thereafter, the prosecution's psychologist conducted *ex parte* interviews of K and J. At a subsequent Article 39(a) session, the psychologist described her interviews of the children. On the basis of those interviews, the psychologist recommended that J be allowed to testify via closed-circuit television. The psychologist also concluded that K could testify in court without any special procedures.

Subsequently, trial counsel moved that a screen be installed in the courtroom during the testimony of K and J to block their view of appellant. She also moved that appellant not be allowed in the courtroom until after the witness was seated in each instance, and that appellant be required to leave the courtroom before each witness departed.

Defense counsel objected to these procedures. He noted that K had testified at length at the Article 32 hearing with appellant in the same room and argued that, while she might have some anxiety, she would be able to testify. "[S]he's done it before, she can do it again."

Without conceding the need for any alternative format with respect to J, he contended that the preferred method under Supreme Court caselaw was to use closed-circuit television, with the witness and counsel in another room and hooked up by audio and video to the courtroom, rather than a screen.

The military judge ruled that J could testify with a screen but that K would testify facing the members and facing away from appellant without a screen unless the screen "appears to become necessary." He ruled that a closed-circuit television camera would project to a monitor "which will be positioned for the military judge, Defense Counsel, the Accused and Court Reporter to see."

When K was called as a witness, she walked into the courtroom and sat at the witness stand in front of the

members, the spectators, and the participants in the court-martial. After she reached the stand. however, her testimony did not begin. Instead, the military judge provided detailed instructions to the members about the television monitor and cameras, ensured that the equipment was working, ruled on whether a government expert could sit at the prosecution table, and further instructed the members as to the purpose of the victim-witness advocate who was seated beside K.

After facing the courtroom while all this activity was undertaken, K spoke privately to trial counsel, and trial counsel requested a recess. When the proceedings reconvened in an Article 39(a) session without K on the stand, trial counsel revealed that K had asked that appellant be excluded from the courtroom when she entered. The military judge asked whether a screen was needed, and trial counsel responded that that was an option. Trial counsel continued:

> I think at this point it would make it easier if she had the screen. However, if the court dictates otherwise, we'll at least try to get her to talk the way the courtroom is set up at this point.

The military judge, without examining the witness or obtaining any further testimony from the psychologist, not only granted the prosecution's request, but also—on his own motion—expanded his original ruling to permit K to testify from behind a screen.

The military judge's ruling did not reflect the teaching of *Craig* that confrontation may not be denied absent a finding that the child witness would be traumatized, "not by the courtroom generally, but by the presence of the defendant," and that the distress suffered by the child is "more than 'mere nervousness or excitement or some reluctance to testify.'" *Craig*, 497 U.S. at 855-56, 110 S.Ct. 3157. The military judge simply noted:

> However, having observed her walk into the courtroom, face the members, the Accused and all of the spectators, I make a finding of fact that she was unable to even approach the witness stand and had to leave the courtroom saying, under her breath, "I can't do this," or words to that affect.

This ruling provides an insufficient basis to justify denying appellant his constitutional right of confrontation where the prosecution's expert witness did not recommend that this witness testify behind a screen, where the judge's initial ruling did not order such a measure, and where there was no examination of the witness by the court or an expert to resolve the ambiguity as to the cause of her reluctance to testify.

The end result was that K testified in a courtroom environment modified in a manner that identified appellant before the members of the court-martial as a person to be feared, a person whose impact on the witness was so traumatizing that extraordinary measures were warranted in the courtroom. When such measures are taken without an adequate showing of necessity, they are unconstitutional. *Craig, supra.*

In recent years, those responsible for the criminal justice system in general and the military justice system in particular have become increasingly aware of the adverse impact on individuals and society that flows from an insensitivity to the rights and needs of victims and witnesses. *See, e.g.*, Victim Rights Clarification Act of 1997, Pub.L. No. 105-6, 111 Stat. 12; Victims' Rights and Restitution Act of 1990, Pub.L. No. 101-7, 104 Stat. 4820; Department of Defense Directive 1030-1. Sensitivity to such concerns, however, does not require disregard of the basic constitutional rights of accused servicemembers.

The prospect of testifying in court, particularly as a victim who must face the accused, is not something that most people would relish. Under *Craig*, it is appropriate for a

court to be particularly sensitive to the impact on a victim of tender years. The obligation to face the accused, however, is enshrined in our Constitution and may be limited only under the narrowly defined circumstances set forth in *Craig*. Failure to follow those procedures in this case created an environment in the courtroom prejudicial to the substantial rights of appellant.

APPENDIX B

UNITED STATES v. Technical Sergeant
DUDLEY S. ANDERSON, FR408-86-5114
United States Air Force

ACM 31996

UNITED STATES AIR FORCE COURT OF
CRIMINAL APPEALS

1997 CCA LEXIS 186

June 18, 1997, Decided

PRIOR HISTORY:

[*1] Sentence adjudged 19 August 1994 by GCM convened at Bolling Air Force Base, District of Columbia. Military Judge: Howard R. Altschwager. Approved sentence: Dishonorable discharge, confinement for 12 years, and reduction to E-l.

DISPOSITION:

Findings of guilty and the sentence AFFIRMED.

COUNSEL:

Appellate Counsel for Appellant: Mr. William J. Holmes, Esq. (argued), Colonel Jay L. Cohen, Major Ormond R. Fodrea, and Captain Todi S. Carnes.

Appellate Counsel for the United States: Colonel Theodore J. Fink, Lieutenant Colonel Michael J. Breslin, and Captain Libby A. Brown (argued).

JUDGES:

Before HEIMBURG, GAMBOA, and SENANDER, Appellate Military Judges. Senior Judge HEIMBURG and Judge GAMBOA concur.

OPINION BY:

SENANDER

OPINION:

OPINION OF THE COURT

SENANDER, Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members, of carnal knowledge, assault, indecent acts, and communicating a threat. Articles 120, 128, and 134, UCMJ, 10 U. S. C. §§ 920, 928, 934 (1994) . His approved sentence is a dishonorable discharge, confinement for 12 years, and reduction to the grade of E-1. The appellant asserts seven errors. We find none of them persuasive [*2] and affirm.

I. BACKGROUND

The appellant was assigned to Keflavik Naval Air Station, Iceland in November 1989. His wife and their two children joined him in January 1990. Mrs. Anderson operated a child care service in her home and served between 25 and 50 children during the time she was in Iceland, including JW during the months of August and September 1990. Another child, KR, was frequently at the appellant's home to play with his daughter. On occasion, the appellant would baby-sit while KR's mother and the appellant's wife played bingo.

All three families were reassigned back to various locations in the United States. On March 25, 1993, KR was in her fourth grade class when she started to say something during an open-ended class discussion, but immediately stopped and looked upset. Later that morning she confided in a classmate, who notified the teacher that she needed to talk to KR. After her conversation with KR, the teacher notified the state child protective services.

KR testified that she was baby-sat at the appellant's house, and at times he would be the only adult present. She stated that sometimes the appellant took her to his bedroom where he would have her undress [*3] and he would undress and lie beside her. On those occasions he placed his hands on her vagina and breasts and also placed his penis in her

vagina. KR testified that he made her bleed when he "stock (sic) his private in me." She stated that this occurred more than once and that it hurt. She didn't report it because he was older and could hurt her. She testified this occurred in appellant's bedroom, with the door closed, while the appellant's children were in other parts of the house.

KR stopped going to the appellant's house after the appellant banned her from playing with his children because she talked about sex in front of his young children. The appellant's wife notified Family Advocacy about KR's inappropriate discussion of sex with other children. Family Advocacy personnel talked to KR's family, but found nothing wrong. As a result of the complaints, KR's mother departed Iceland early with KR.

After KR's allegations were made, the appellant's wife asked JW's mother to be a character witness for her husband, since Mrs. Anderson baby-sat JW. This request was made shortly after the appellant was suspected of abusing KR. JW's mother was supportive of the appellant and never asked [*4] her daughter whether she had been abused. Several months later, in September 1993, an Air Force Office of Special Investigations (AFOSI) Special Agent talked to JW's father, who called his wife and told her to determine if JW had been abused. Before broaching the subject with JW, her mother consulted Master Sergeant (MSgt) John Williams at the Tyndall Air Force Base (AFB) Family Advocacy Office. MSgt Williams testified that JW's mother sounded anxious as she inquired about the proper way to question her daughter about sexual abuse. MSgt Williams said that JW's mother called back a few minutes later and was crying as she sought further guidance.

JW was born in March 1985. Mrs. Anderson baby-sat JW at her home three times a week during August and September 1990. JW's mother testified that Mrs. Anderson had asked her if it would be all right if the appellant baby-sat JW when she went to hospital appointments. The appellant

admitted that he baby-sat KR, but denied that he baby-sat JW alone.

II. FACTUAL AND LEGAL SUFFICIENCY

The appellant asserts the evidence is factually and legally insufficient to support his conviction. It is the responsibility of this Court to review a case for both [*5] factual and legal sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c) (1994). The test for legal sufficiency is whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (*citing Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *United States v. Ladell*, 30 M.J. 672, 673 (A.F.C.M.R. 1990) . For factual sufficiency, the test is whether, after weighing the evidence in the record and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Id.*

The appellant's own testimony, along with that of his wife and KR's mother, clearly demonstrate that he was alone with KR and had the opportunity to commit the charged offenses. A physical examination of KR found "posterior tenuations" on her hymen which was consistent with abuse. Dr. Robert Hartmann examined photographs of KR's hymen and concluded that it had been torn and that was caused by something penetrating through the hymenal opening to stretch it. KR's original statement, which prompted [*6] this investigation, was made to a teacher after a class discussion nearly two years after she last saw the appellant. KR made the accusation only after confiding in another student who reported the conversation to the teacher.

KR's trial testimony was not contradictory or uncertain as she stated the appellant touched her breast and vagina and made her bleed when he put his penis in her vagina. Blood was observed on KR's underwear by her mother when

they lived in Iceland, but the mother thought it was the start of menstruation.

JW testified that she knew the difference between a "good touch" and a "bad touch." She said that "Dudley" did a bad touch and she spelled the word "Boob" for the interpreter to write down when asked where the appellant touched her above the waist. When asked where she was touched by the appellant below the waist she said "potty place." She said he squeezed her "potty place" both in front and back while wearing a see through plastic glove. The touching happened in his bedroom when no one else was present and it happened more than once. JW testified that the appellant hit her on the upper arm when she was trying to squirm away. She also said that the appellant [*7] told her; " . . . if I ever tell anybody, and I was near or anything, he'd kill me." JW also testified the appellant had a six or eight inch long gun with which he threatened her. She said she liked to go to the appellant's house to play with his daughter, but didn't like it when his wife wasn't present.

Other than the appellant's denials, there was no evidence to contradict the allegations of either KR or JW. There was ample evidence for the members to find the appellant guilty of each offense and we are convinced of the appellant's guilt beyond a reasonable doubt.

III. RIGHT OF CONFRONTATION

The appellant next asserts the military judge erred by allowing the two victims to testify behind a screen in violation of the appellant's constitutional right to confront his accusers.

The Supreme Court has held that the Sixth Amendment right to be confronted by adverse witnesses includes literal face-to-face confrontation. *Coy v. Iowa*, 487 U.S. 1012, 101 L. Ed. 2d 857, 108 S.Ct. 2798 (1988). But this right was further refined when the Supreme Court held that the face-to-face requirement is not absolute and may be abridged when

necessary to further an important public policy. *Maryland v. Craig*, 497 U.S. 836, 857, 111 L. Ed. 2d 666, 110 S.Ct. 3157 (1990). [*8]The determination of necessity for abridging the requirement for face-to-face confrontation is a question of fact. Accordingly, the military judge's finding of necessity will not be reversed unless it is clearly erroneous or unsupported by the record. *United States v. Carrier*, 9 F.3d 867, 870-1 (10th Cir. 1993). *United States v. Longstreath*, 45 M.J. 366 (1996).

The appellant was not excluded from the courtroom and his ability to communicate with his defense counsel was not hampered as in *United States v. Daulton*, 45 M.J. 212 (1996). The appellant and defense counsel were able to be in the same courtroom and see both witnesses via closed circuit television while they testified from behind a screen. The court members could view the witnesses directly and judge their credibility. The Court of Appeals for the Armed Forces, following *Craig*, held: "Where the placement of a witness prevents face-to-face confrontation to protect the welfare of a child victim who is a witness in the case, there must be a case-specific finding of necessity by the military judge." *United States v. Williams*, 37 M.J. 289 (C.M.A. 1993)

A psychologist, Doctor (Dr.) Linda Bessett testified that [*9] she had interviewed both KR and JW and reviewed their prior statements and testimony. Dr. Bessett determined KR was frightened and anxious. KR didn't believe she could look at the appellant for very long. JW told Dr. Bessett that she was very scared that the appellant might kill her. She explained that he had a knife, and threatened her with it, and tried to kill her when she wouldn't cooperate with him. Dr. Bessett believed JW had an overwhelming fear of the appellant and did not want him close to her in any way.

The military judge made a specific finding of fact as part of his ruling on the trial counsels motion to permit alternative methods of testimony for KR and JW. The military judge found:

> In this case, I specifically find that the procedure requested is necessary to protect the welfare of these two child witnesses; that the children would be traumatized, not by the courtroom generally, but by the accused's direct sight presence; and the emotional distress suffered by the children in the accused's presence is more than de minimis.
>
> KR will be allowed to testify facing away from the accused, directly facing the court members. JW will be allowed to testify facing the trial [*10] counsel. The closed circuit television camera will project their images to a television which will be positioned for the military judge, defense counsel, the accused, and the court reporter to see. A screen will not be set up for KR, unless its presence appears to become necessary. A screen will be positioned along the side of the witness box for JW. The witnesses may already be on the stand before the military judge and members come into the room. The accused will be seated at the seat at the defense counsel table which is farthest away from the witnesses. Cross examination of the witnesses will be done in such a position that the vision of the witnesses conforms with the spirit of this ruling. The witnesses will be instructed to speak up, and to let the court know when they need a break. The victim witness assistant may sit next to the witnesses while they testify, but may not give them any cues.

We hold the military judge made a proper finding of necessity based on the expert testimony presented. The judge limited the alternative means of testimony in the case of KR to placement of the witness, but permitted a screen when, after KR entered the court room, she was unable to testify [*11] with that arrangement. The record of trial supports the military judge's ruling and it is not clearly erroneous.

The failure to include a photograph of the courtroom layout in the record of trial as ordered by the military judge did not hamper our review of this issue. The diagram and description of the courtroom layout were adequate to understand the positioning of the parties.

IV. ADMISSIBILITY OF EXPERT TESTIMONY

Ms. Diana Schofield testified as an expert witness in the area of child sexual abuse. She is a licensed social worker who has worked with more than 365 sexually abused children and has previously testified in several criminal trials as an expert in child sexual abuse. The appellant asserts Ms. Schofield's testimony was improper for three reasons. First, he questions her status as an expert; he suggests her testimony constituted improper perpetrator profile evidence; finally, he argues she functioned as a "human lie detector."

The trial counsel called Ms. Schofield as a government expert witness and the defense counsel conducted a voir dire examination of her qualifications and made no objection to her testifying as an expert on child sexual abuse. In the absence [*12] of plain error, the appellant waived this issue by failing to object. To be plain error, the error must be obvious, substantial, and have had an unfair prejudicial impact on the members. *United States v. Olano*, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S.Ct. 1770 (1993). We find no plain error.

Ms. Schofield explained the different aspects of child sexual abuse accommodation syndrome. This is a model for why victims of child sexual abuse often engage in what adults would consider misleading and contradictory behavior in response to the abuse. This model of behavior consists of: keeping the abuse secret; having a sense of helplessness; accommodating the abuser by not "telling"; feeling guilty for having seduced the adult; disclosing the abuse, either accidentally or on purpose; and, finally, recantation. Following her explanation, the trial counsel asked Ms.

Schofield to explain the facts of this case in relation to the secrecy part of the syndrome.

> [She responded]: Well, uh, Sergeant Anderson was actually in the position of being a baby sitter. In one case, his wife was a very good friend. His daughter was a playmate. So he met all of those, the things in the sense that he did have the power and he did have the access [*13] and did threaten, or allegedly threatened the children.
>
> Q: What about helplessness?
>
> [Ms. Schofield]: Same, same, the same piece as that, uh those two really fit together in the sense that his was an adult, this is an adult whose parents trusted. That, uh, had power, actually allowed to be a baby sitter. I understand he was a back up for his wife's day care. And because of that he had that ability to have access to these children and have that kind of power over these children.

The appellant now characterizes this testimony as improper perpetrator profile evidence, but he did not object to the testimony during trial. Absent plain error, we may not find the military judge erred in ruling on the admission of evidence unless the ruling materially prejudices a substantial right of the appellant and the appellant made a timely objection, stating the specific ground for the objection. MIL. R. EVID. 103(a); *United States v. Pagel*, 40 M.J. 771 (A.F.C.M.R. 1994), *aff'd*, 45 M.J. 64 (1996). The explanation by Ms. Schofield of child sexual abuse accommodation syndrome in relation to the appellant's case explained the actions of the children involved and did not profile the appellant [*14] as someone likely to commit child sexual abuse. It was not plain error for the military judge to admit this testimony which did not improperly profile the appellant. *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992).

The appellant also asserts that Ms. Schofield acted as a "human lie detector" as she explained the ability of children

to retrieve information from their memory. The trial defense counsel twice cut the witness off with unspecified objections, one sustained and one overruled. Defense counsel then explained that the witness was trying to vouch for the credibility of all children. The military judge gave the following instruction:

> Members of the Court, you're advised that only you the members of the Court determine the credibility of witnesses in what the facts of this case are. No expert witness or other witness can testify that the alleged victims account of what occurred is true or credible, or that the expert believes that the alleged victims, or that the expert believes the alleged victims, or that a sexual encounter occurred. To the extent that you believed (sic) that Miss Schofield has testified or implied that she believes the alleged victims or that a crime [*15] occurred or that the alleged victims are credible, you may not consider this as evidence that a crime occurred or that the alleged victims are credible.

The military judge properly disposed of the appellant's objection by instructing the members and no subsequent objections were made by the appellant.

V. INSTRUCTIONS

The trial counsel requested an instruction concerning what he called prior consistent statements. As an exception to the hearsay rule, a party may offer a prior consistent statement by a witness to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. MIL.R.EVID. 8 01 (d) (1) (B) . No pretrial statements were offered or admitted into evidence and no mention of prior consistent statements was made until the trial counsel requested an instruction. During direct examination neither child gave detailed answers about the abuse; the defense counsel used their prior statements in

cross-examining them and they confirmed the truth of their prior statements.

The military judge gave the following instruction:

> You have heard evidence that the witness KR made statements prior to trial that may be consistent with her testimony [*16] at trial, specifically, that the abuse began in the Summer of 1990; the bleeding happened in the living room; he put his private part in her private part; his threat that he would not allow her to play with [T] ; and she told [BC] that he was doing stuff to her too. You have heard evidence that the witness JW made statements prior to trial that may be consistent with her testimony at trial, specifically, that he put a knife to her neck; he threatened her with a gun ; he threatened to kill her; he put a pillow over her face; and he touched her "boob" with his fingernail. If you believe that such a consistent statement was made, you may consider it for its tendency to refute the charge of improper influence or improper motives. You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein. . . .

The appellant asserts the prosecution did not lay the proper predicate pursuant to *United States v. McCaskey*, 30 M.J. 188 (C.M.A. 1990), so that prior consistent statements of KR and JW could be used as substantive evidence. This assertion is without merit since no prior consistent statements were introduced. The victims, answers during [*17] cross-examination were substantive evidence and were before the members. There is no question of admissibility of evidence, only a question of instructions. The military judge incorrectly characterized them as prior consistent statements.

We review a military judge's instructions for correctness by using an abuse of discretion standard. *United States v.*

Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993). To succeed on appeal, an appellant must demonstrate that any error had "an unfair impact on the court members, deliberations." *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986).

The military judge's instruction should not have been given since the statements were not admitted as an exception to the hearsay rule. The statements were substantive evidence elicited by the trial defense counsel on cross-examination of the two victims. The military judge included two statements in his instruction on prior consistent statements, but the defense did not object to them—specifically, that the abuse began in the summer of 1990 or that the bleeding happened in the living room. We find no prejudice to the appellant.

VI. ARGUMENT

The appellant asserts that a portion of trial counsel's [*18] argument on findings contravened the military judge's instruction regarding spillover:

> What is key is that the Accused committed these acts. What is key is to know the parallel between two young girls that do not know each other, never met each other, were not baby sat at the same time in the accused's house, but yet they have very similar things to say. And the reasoning is because the Accused is guilty of all charges and specifications. Thank you.

The appellant did not object to any portion of the trial counsels argument and in the absence of plain error this constitutes waiver. *United States v. Ramos*, 42 M.J. 392 (1995). The trial defense counsel elicited testimony that KR's father was responsible for any sexual abuse inflicted upon KR and therefore identity was a factor for the court members. The trial counsels argument was properly grounded and its probative value was not outweighed by the

danger of unfair prejudice. *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

VII. OTHER ISSUES

The appellant asserts the convening authority committed prejudicial error by failing to grant a new trial when presented statements by the appellant's mother-in-law and a family [*19] friend indicating the president of the court-martial was sleeping on 13 occasions during the trial. In addition, the appellant's mother-in-law claimed a court member spoke to the trial counsel during a break and that same member came out of the staff judge advocate's office. Affidavits from the court president and the staff judge advocate refute these allegations. The convening authority acted properly in resolving this issues. In addition, there was no request for a new trial made to the convening authority.

We find no error in the corrective action taken by the convening authority when he withdrew the erroneous action of November 9, 1995. R.C.M. 1107(f)(2).

We find no evidence that the convening authority disregarded proper review standards in this case and we reject the appellant's assertion that a base newspaper article reflected an inelastic attitude by the convening authority as to his duties. *United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987). The military judge granted one day administrative credit which was not reflected in the court-martial order. We will correct that error by ordering one day sentence credit.

We conclude the findings and sentence are correct [*20] in law and fact, the sentence is appropriate, and no error prejudicial to the substantial rights of the appellant was committed. The appellant will be credited with one day sentence credit as ordered by the military judge. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge HEIMBURG and Judge GAMBOA concur.